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In the Supreme Court of the United States

JOSE MONTEMAYOR, COMMISSIONER OF THE TEXAS DEPARTMENT OF INSURANCE; JOHN CORNYN, ATTORNEY GENERAL OF TEXAS,
Petitioners,

v.

CORPORATE HEALTH INSURANCE, INC.; AETNA HEALTH PLANS OF TEXAS, INC.; AETNA HEALTH PLANS OF NORTH TEXAS, INC.; AETNA LIFE INSURANCE COMPANY,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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UNITED STATES GENERAL ACCOUNTING OFFICE, REPORT NO. GAO/HEHS-98-154, EMPLOYER-BASED MANAGED CARE PLANS: ERISA'S EFFECT ON REMEDIES FOR BENEFIT DENIALS AND MEDICAL MALPRACTICE (July 1998) 6

I. The Question Presented Is Ripe for Adjudication.

The question presented is precisely the question left unanswered by the Court in *UNUM Life Insurance Co. of America v. Ward*: whether a state insurance law that falls within the savings clause is nevertheless preempted by ERISA §502(a) if it provides an independent state-law remedy. 526 U.S. 358, 376 (1999). The question arose in this case when the Fifth Circuit extended *Pilot Life v. Dedeaux*, 481 U.S. 41 (1987), to hold that Texas' Independent Review Process ("IRO process")—a state insurance law within the meaning of the savings clause—nevertheless was preempted because it conflicts with ERISA §502(a). Appendix to Petition for Writ of Certiorari (hereafter Pet. App.) at A-15-16. In reaching its holding, the Fifth Circuit necessarily rejected Texas' argument that *Pilot Life*'s preemption analysis was not applicable to the IRO process. Texas specifically objected to the Fifth Circuit's extension of *Pilot Life* in its petition for rehearing, but the panel declined to rehear the matter. The issue is now squarely before this Court.

Contrary to the position taken in Respondent's Brief in Opposition (Aetna Brief),[1] the circuits are divided on the proper application of §502(a) to "saved" state-insurance-law remedies. Aetna contends that because *Franklin H. Williams Insurance Trust v. Travelers Insurance Co.*, 50 F.3d 144 (2nd Cir. 1995) ("*Williams Trust*"), and *PAS v. Travelers Insurance Co.*, 7 F.3d 349 (3rd Cir. 1993), were removal cases, the question presented here was not decided.

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[1] Respondents will be referred to collectively as Aetna.

This analysis is wrong. When §502(a) is alleged to be a basis for preemption, it is considered an assertion of complete preemption justifying removal. *See Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 66 (1987).[2] Neither of these cases held, as Aetna suggests, that conflicts preemption should be resolved by a state court because there was no complete preemption. Rather, these cases explicitly hold that state-insurance-law remedies can be saved from preemption. *Williams Trust*, 50 F.3d at 151 (district court erred in holding §502(a) preempts New York insurance law); *PAS*, 7 F.3d at 356 ("a necessary requirement for conflict preemption is missing here").

The Fifth Circuit, on the other hand, interpreted *Pilot Life* to compel preemption of state-insurance-law remedies under §502(a). This holding is in direct conflict with the Second and Third Circuits' view of the savings clause. In fact, the Fifth Circuit specifically noted that its decision conflicted with *Williams Trust*. Pet. App. at A-15, A-25 n.59. The Second Circuit relied on the plain meaning of the savings clause to hold §502(a) does not preempt a state-insurance-law remedy. *Williams Trust*, 50 F.3d at 151. The Fifth Circuit, cognizant of that holding, ruled precisely the opposite. Pet. App. at A-15. Thus, Aetna's argument that the case is not ripe for adjudication because the Fifth Circuit did not consider the question presented is belied by the Fifth Circuit's opinion.

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[2] *See McClelland v. Gronwaldt*, 155 F.3d 507, 517 (5th Cir. 1998).

Aetna also mistakes the conflict between the Fifth and Seventh Circuits. The Seventh Circuit in *Moran v. Rush Prudential HMO, Inc.*, 230 F.3d 959 (7th Cir. 2000), held, in accordance with *Ward*, that state-insurance-law remedies can be enforced in a §502(a) proceeding. This precise reasoning was urged by both Texas and the U.S. Department of Labor ("DOL") in the Fifth Circuit. Moreover, though Aetna disputes the existence of a conflict between the Fifth and Seventh Circuits, at least four Seventh Circuits judges disagree. Judge Posner, joined by Judges Coffey, Easterbrook, and Wood, dissented from the Seventh Circuit's denial of rehearing en banc, stating that *Moran* "creates a square conflict" with the Fifth Circuit. *Id.* at 973 (Posner, J., dissenting from denial of rehearing en banc).

Aetna argues that in *Moran* the Seventh Circuit concluded that Illinois' statute "could not be properly characterized as an alternate or supplemental enforcement mechanism." Aetna Brief at 10-11. Aetna then claims that because Texas' statute is properly characterized as an alternate enforcement mechanism, there is no conflict. *Id.* That is sophistry. As Judge Posner observed, in regard to the *Pilot Life* arguments before this Court, the Texas and Illinois laws are "materially identical." *Moran*, 230 F.3d at 973.[3] The different results do not stem from substantive distinctions in the two states' independent review provisions, but from a difference in the circuits' reasoning. The Seventh Circuit did not characterize the Illinois statute

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[3] In regard to "relates to" analysis, there are relevant differences. *See* Petition for Writ of Certiorari (Petition) notes 10 and 18.

as an alternate enforcement mechanism because it was "not tantamount to the relief offered under sec. 502(a)(1)(B)." 230 F.3d at 971. The Fifth Circuit characterized the IRO process as an alternate remedy because it thought it provided "the identical relief offered under §[502](a)(1)(B)." Pet. App. at A-16-17. This is conflict.

Curiously, Aetna appears to concede that if the IRO process is considered an insurance law incorporated into an ERISA plan, then it would be saved from preemption under this Court's analysis in *Ward*. Aetna Brief at 14. Although Aetna disagrees with this characterization of Texas' independent review law, this was precisely the interpretation given the "materially identical" Illinois independent review provisions at issue in *Moran*. 230 F.3d at 969-70. The Fifth Circuit likewise characterized the IRO process as creating a "procedural right of the insured" (Pet. App. at A-14), but then held that this procedural right could not be enforced. By contrast, the Seventh Circuit held that such a state-created procedural right could be enforced. That is the "square conflict" referred to by Judge Posner—a conflict that is directly before this Court.

Further decisions by other circuit courts of appeal are not needed to illuminate the legal issues presented. The Fifth and Seventh Circuits have diametrically opposed views of the savings clause. The Seventh Circuit allows independent review laws to be enforced; the Fifth Circuit does not. The Second and Third Circuits allow a state-insurance-law remedy to be enforced; the Fifth Circuit does not. Further circuit decisions will necessarily devolve into

one of these two camps. Only this Court's guidance can resolve this issue.

Moreover, while Aetna suggests that "percolation" might resolve the split between the Fifth and Seventh Circuits by inspiring the Seventh Circuit to reconsider its position, the denial of rehearing en banc in *Moran* suggests otherwise. If the Seventh Circuit refused to rehear *Moran* en banc over the vehement protests of Judges Posner, Coffey, Easterbrook, and Wood—who expressly highlighted the "square conflict" with the Fifth Circuit—it is unlikely that percolation will spur some future en banc resolution of the split. Delay serves no useful purpose because the issues have been clearly framed and the well-being of millions of citizens is at stake.

Finally, Aetna claims the question is not ripe for adjudication because Congress is considering legislation that may address Texas' concerns.[4] That Congress is

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[4] Actna also argues in opposition to Texas' Petition that the Court should wait to rule because the DOL has promulgated regulations that may affect the issue of preemption of state external review laws. Those regulations do not, however, provide for independent external review. Rather, the regulations provide only for internal review by a different fiduciary and only require consultation with a health care professional. Pension and Welfare Benefits Administration, 65 Fed. Reg. 70246, 70269 (Nov. 21, 2000) (to be codified at 29 C.F.R. pt. 2560). Texas already provides similar internal review requirements. TEX. INS. CODE art. 21.58A, §6. The IRO process provides for independent, external review. *Id.* art 21.58A, §6A. That is something DOL cannot do by regulations. "DOL says it lacks authority to require independent review." UNITED STATES GENERAL ACCOUNTING OFFICE, REPORT NO. GAO/HEHS-98-154,

considering requiring independent review bespeaks the importance of independent review. But that does not mean Texans should be denied independent review while Congress is considering the issue. Congress may or may not pass such legislation. In addition, the States have an independent duty to promote their citizens' well-being and regulate insurance practices within their borders. The question is not whether Congress may address the issue in the future. Rather, the question is whether the majority of states that have already enacted independent review statutes can enforce these laws. This issue is squarely before this Court, and it warrants expedient resolution.

II. Independent Review Laws Are Laws Regulating Insurance.

Alternatively, Aetna argues the petition should not be granted because the Fifth Circuit erred in finding the IRO process was an insurance law. First, Aetna erroneously claims that Texas' independent review law is not an insurance law, because it can reach self-funded employee benefit plans. Aetna's analysis fails for two reasons. First, a law that relates to a self-funded plan is not necessarily precluded from being an insurance law. Rather, the deemer clause, 29 U.S.C.A. § 1144 (b)(2)(B), prevents a state from applying that insurance law to a self-funded plan. *See FMC Corp. v. Holliday*, 498 U.S. 52, 64-65 (1990); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 735 n.14

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(1985). Second, Texas excludes self-funded ERISA plans from its utilization review law, which is the underpinning of the IRO process.[5] Pet. App. at A-23 n.42. The deemer clause, therefore, is not implicated by this case.

Aetna also argues that the IRO process does not spread risk even though spreading risk is precisely what medical necessity decisions do.[6] Aetna makes much of the fact that its reversals of an attending physician's decision that medical care is necessary purportedly "does not prohibit a member from *receiving* such treatment." Aetna Brief at 15 (emphasis in original). Instead, the member "bear[s] the *financial risk* of covering any desired care that is not medically necessary." *Id.* at 20 (emphasis added).

Aetna would have the Court believe that this case is about members wanting unnecessary medical care and asking Aetna to pay for it. But that is not what Texas' IRO process protects. Instead, the IRO process ensures the provision of medically necessary care by preventing insurers, like Aetna, from erroneously substituting their medical judgment for that of a member's attending physician. Texas' law is about getting medical decisions right so that necessary care is provided.

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[5] Aetna did not challenge that law below, or Texas' long-standing interpretation and application of the law.

[6] The Fifth Circuit questioned whether the IRO process spreads risk, but decided it did not need to address that factor to determine the IRO process was a law regulating insurance. Pet. App. at A-15.

If Aetna incorrectly determines medical necessity and members are forced to pay for care out of their own pockets, then the risk assumed for providing all medically necessary care is transferred back to members.[7] The purpose of Texas' IRO process is to ensure that medically necessary care is provided—and, only medically necessary care. As a result, risk is spread appropriately not just for an individual member, which makes the IRO process integral to the insurer/insured relationship,[8] but for all of Aetna's members. This risk-spreading between an insured and all of its insureds is exactly what insurance is designed to do.

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[7] If a member cannot assume that risk, then necessary medical care is not received. When Aetna or any other MCO exercises medical judgment to determine what care is or is not necessary, it not only performs a traditional insurance payment function, but crosses over into the field of health care. This implicates the states' traditional role of regulating the provision of health care. That is why this Court's decision in *Pegram v. Herdrich*, 530 U.S. 211 (2000), is relevant to the analysis of whether Texas' IRO provisions "relate to" ERISA plans. Because of Congress's synonymous use of "relates to" in FEHBA, if Congress did not intend to preempt state health care regulation in ERISA, there is no reason to ascribe a contrary intent with respect to FEHBA. Accordingly, the Fifth Circuit erred when it held Texas' IRO process conflicted with FEHBA.

[8] Aetna argues that the IRO process is not integral to the relationship between the insurer and the insured because it does not define the terms of the policy, it only deals with the administration of those terms. This Court has rejected that analysis. *Ward*, 526 U.S. at 375 n.5.

CONCLUSION

For these reasons, and those set forth in Texas' Petition for Writ of Certiorari, the Court should grant the petition and reverse the judgment of the Fifth Circuit.

Respectfully submitted,

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